No. 89-182

In The

Supreme Court of the United States

October Term, 1988

JACK J. GRYNBERG and CELESTE C. GRYNBERG,

Petitioners,

v.

PAUL DANZIG, et al.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I.

THERE IS NO BASIS FOR GRANTING A WRIT IN THIS ACTION.

1. Petitioners' collateral attack upon the California judgment is barred by *res judicata*.

a. The California judgment is final; this Court denied *certiorari* in the original action.

b. Petitioners had a full and fair opportunity to litigate in the original proceedings all of the issues which they now raise by collateral attack.

c. *Phillips Petroleum v. Shutts* does not provide a basis for collateral attack upon a final state court judgment.

2. The original *Danzig* action did not raise issues similar to those decided in *Phillips Petroleum v. Shutts*.

a. Petitioners did not timely raise any issue of alleged lack of jurisdiction over the members of the plaintiff class or any alleged defect in the class notice in the trial court. Such issues cannot be raised for the first time on appeal from the judgment and cannot be raised by collateral attack upon a final judgment.

b. Each of the class members filed verified answers to interrogatories prior to trial, thereby voluntarily subjecting themselves to the jurisdiction of the California courts.

3. Petitioners waived any claim of denial of due process by failing to assert such claim before the trial

court and failing to object to any alleged defects in the existing class notice before proceeding to trial as a class action.

II.
STATEMENT OF THE CASE

Petitioners herein seek to collaterally attack a final judgment rendered by a California Superior Court in favor of respondents. This is the second time that this case has been brought before this Court on Petition for Certiorari. The original Petition (Docket No. 84-1784) was filed from the judgment entered in the California trial court[1] and affirmed by the California appellate courts.[2] In their original Petition, Grynbergs presented essentially the same arguments as they submit in this current Petition. Indeed, since *Phillips Petroleum v. Shutts* was decided after Grynbergs filed their Petition but before the Court had acted on it, they filed a *"Supplemental"* Petition contending that *Phillips* was applicable to this case and urging a hearing *on that basis*. This Court denied certiorari on October 7, 1985. The California judgment thus became final on that date.

Respondents herein, the members of the plaintiff class to whom the original California judgment had been

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[1] *Danzig, et al. v. Grynberg, et al.*, State of California, Alameda County Superior Court action #4620.2-4 (hereinafter *"Danzig* action" or *"Danzig* judgment").

[2] *Danzig v. Jack Grynberg & Associates* (1984) 161 Cal.App.3d 1128, 208 Cal.Rptr. 336, *cert. den.* 474 U.S. 819 (1985).

awarded (the "*Danzig* claimants")[3], immediately sought allowance of the claims which they had filed in the Grynberg bankruptcy based upon the *Danzig* judgment. Grynbergs objected, seeking to collaterally attack the *Danzig* judgment. The Bankruptcy Court allowed the claims. Grynbergs then appealed that Order to the United States District Court of Colorado, which affirmed, and then to the 10th Circuit, which also affirmed the Order allowing the claims. Thus, as the 10th Circuit pointed out in its opinion:

> "*This court is the seventh forum in which Grynbergs have pursued essentially the same arguments.* The salutary purposes of the doctrine of repose have never been more evident." (Emphasis added.) (10th Cir.Op., A. p. 4.)[4]

To which the *Danzig* claimants, who have now waited more than 9 years since the entry of their judgment to collect the sums found to be owing to them as a result of Grynberg's intentional fraudulent misrepresentations, respectfully say "Amen".

A. History Of The Primary Action.

The *Danzig* claims which are the subject of the Order of the Bankruptcy Court are based upon a judgment

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[3] Each of the *Danzig* claimants had filed individual claims in the Grynberg bankruptcy proceedings based upon their individual allocated shares of the judgment.

[4] The opinions of the District Court (cited as "Dist.Ct.Op.") and the 10th Circuit (cited as "10th Cir.Op.") are set forth in the Appendix to the Petition; citation references to these opinions are to that Appendix.

entered in favor of the *Danzig* claimants in the Superior Court of the State of California, County of Alameda, on December 22, 1980.

The *Danzig* action was initiated by five named plaintiffs on behalf of all limited partners of a limited partnership known as the Greater Green River Basin Drilling Program 72-73 Limited Partnership ("GGRB") against Petitioners herein. Petitioners, as the general partners of GGRB, had represented in the prospectus, and in a summary sheet sent to all limited partners immediately prior to their respective subscriptions to the partnership, that oil and gas leases held in the names of the Grynbergs would be contributed to the partnership and, upon termination thereof, would revert to all of the partners *pro rata*. The limited partners contributed all of the capitalization of the partnership, which was used to maintain and drill the leases and pay management and operational fees to Petitioners. Many of the limited partners contributed additional sums pursuant to a purported amendment to the partnership agreement. The partnership terminated when all of the capitalization was exhausted. Upon termination of the partnership, Grynbergs contended that they were entitled to full reversion of the leases and that the limited partners retained no continuing *pro rata* interest in them.

The initial complaint alleged seven causes of action, as outlined in the Opinion of the Bankruptcy Court. (Record Vol. 1, p. 660.) That complaint specifically alleged the misrepresentations and nondisclosures of Grynbergs with regard to the contribution of the leases.

In December, 1975, *the action was certified as a class action on all causes of action. Notice in a form approved by the court was mailed to all class members. No member of the class opted out of the action.* Three years later, the plaintiff class moved to amend the complaint to assert additional causes of action to rescind the partnership agreement based upon the misrepresentations and nondisclosures of Grynbergs. The amended causes of action were based entirely upon the facts alleged in the original complaint and merely sought alternative forms of relief. The amendment was permitted based on the determination by the law and motion judge that it presented *no* new legal or factual issues; the trial judge also expressly so found when he denied a later motion for continuance of the trial.

Prior to trial, each member of the *Danzig* class, *i.e., each claimant herein,* filed *individual verified* answers to interrogatories propounded by Grynbergs, relating to the factual issues of misrepresentations, nondisclosures and reliance.

The action proceeded to trial in March, 1980, *as a class action without objection,* as the Bankruptcy Court expressly found. (Record Vol. I, p. 661; p. A. 27.) Grynbergs raised *no* objection to any alleged deficiency in the existing notice which had been sent to all members of the class as a result of the amendment nor did they assert any contention or objection to the jurisdiction of the court over the members of the class, by answer to the amended complaint, motion or otherwise. They interposed *no* objection to proceeding to trial on the amended pleadings based on the original class certification and the original notice to the class members, thus affording no opportunity to the

court or the plaintiff class representatives to cure the alleged deficiency prior to trial. Throughout the course of the trial, all parties treated the action as a class proceeding.

After a seven-week trial, the trial judge filed a Statement of Decision in which he found that Grynbergs had induced the subscriptions to GGRB by fraudulent misrepresentations and nondisclosures contained in the prospectus and the written summary sent to each class member. The court therefore ordered rescission of the partnership agreement and amendment as to all class members, restoration of the sums paid by each class member and additional compensatory damages. The court also imposed punitive damages against Jack Grynberg only, based on findings that he had committed the misrepresentations and nondisclosures knowingly and intentionally. Proposed findings of fact and conclusions of law were submitted. Grynbergs filed lengthy objections to the proposed findings and conclusions, but raised *no* objection to the propriety of class adjudication because of any alleged deficiency in the class notice or pretrial certification procedure even at that stage of the proceedings.[5] After lengthy oral argument, the trial court filed its Findings and Conclusions,[6] specifically determining, *inter*

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[5] Grynbergs did object to the adequacy of the *class* representatives.

[6] Petitioners state that the trial court made no finding as to how it had acquired jurisdiction over the absent class members and further made no finding that they had waived their right

(Continued on following page)

alia, that all of the requisites for a class action and a class judgment had been satisfied.

After entry of judgment, Grynbergs filed motions for a new trial. In those motions, Grynbergs claimed *for the first time* that pretrial notice to the class had been inadequate. The motions were briefed at length and vigorously argued. The trial court denied the motions. Grynbergs then appealed the judgment to the California Court of Appeal.

Grynbergs failed to post an appeal bond, as required by California law, and execution was therefore issued. Grynbergs then filed the subject bankruptcy proceedings. Grynbergs' counsel represented to the Bankruptcy Court that the bankruptcy proceedings were filed to prevent execution upon the *Danzig* judgment.

(Continued from previous page)

to assert any alleged deficiency in the class notice. These statements underscore the dissembling nature of Petitioners' claims. Since Petitioners had never contended, and did not contend in their objections to the findings, that the court lacked jurisdiction over any class member, or that there had been any defect or deficiency in the class notice, the court was not required to enter findings on those issues. Indeed, neither the trial court nor the *Danzig* claimants had any knowledge of any such contention. The court *did* find, however, that the class had been properly constituted and certified, and that entry of judgment in favor of the entire class was proper.

Claimants duly filed their respective claims in these proceedings[7] individually and, alternatively, as members of the *Danzig* class[8], based upon the judgment.

On November 21, 1984, the Court of Appeal of the State of California affirmed the judgment of the trial court. (Record Vol. I, p. 538.)[9] The appellate court expressly considered and ruled upon each of the legal issues which Grynbergs raise before this Court as their basis for collateral attack upon the judgment. Specifically, the appellate court held, in accordance with California (and federal) law, that a defendant may not proceed to trial on the merits in an action *which has been certified as a class action and in which notice has been sent to all class members* without objection to the pretrial certification procedure or the form of notice which has been sent to the class and then, if he loses, raise for the first time objections concerning such pretrial procedures which could otherwise have been cured prior to trial. Such objections must be raised *prior* to trial on the merits or are deemed

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[7] The *Danzig* claimants filed their claims based upon their respective interests in the *Danzig* judgment. Each claimant set forth alternative claims based on the original partnership and the misrepresentations made by Grynbergs with regard to solicitation of the investments in the partnership (i.e., the claims raised in the California trial court) in the event the *Danzig* judgment was reversed by the appellate court.

[8] The Bankruptcy Court held the class claim to be inappropriate and disallowed it. The District Court did not rule on that issue since allowance of the individual claims renders the class claim moot. The 10th Circuit similarly did not rule on the propriety of the class claim.

[9] *Danzig v. Jack Grynberg & Associates*, 161 Cal.App.3d 1128, 208 Cal.Rptr 336 (1984), *cert. den.*, 106 S.Ct. 67 (1985).

to have been waived. A Petition for Rehearing was denied. A Petition for Hearing before the California Supreme Court was denied on February 14, 1985.

In each of those petitions Grynbergs again raised the issues which they now raise before this Court for a second time.

Grynbergs then filed a Petition for *Certiorari* before this Honorable Court, again raising each of the issues set forth in their current Petition. While that Petition was pending, *Phillips Petroleum v. Shutts* (1985) 472 U.S. 797 was decided by this Court. Petitioners immediately filed a Supplemental brief before this Court, contending that *Phillips* established that Petitioners had been denied due process, and that *certiorari* should be granted on that ground.

The Petition for Certiorari was denied on October 7, 1985, rendering the *Danzig* judgment absolutely final.

B. History Of This Collateral Proceeding.

Upon denial of *certiorari*, the *Danzig* claimants sought allowance of their claims from the Bankruptcy Court.[10] Petitioners then objected to allowance of the claims, claiming that *Phillips* established that they had been denied due process in the California trial court because a new notice had not been sent to the class members when

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[10] The motion for allowance had originally been filed at an earlier point in time but had been continued until the Petition for Certiorari was decided based on Petitioners' objection that the judgment would not be final until this Court acted.

the complaint was amended.[11] The Bankruptcy Court held that the California judgment was *res judicata* and that no basis existed upon which the judgment could be collaterally attacked; the court therefore ordered that the *Danzig* claims be allowed and paid. Petitioners appealed to the District Court and to the 10th Circuit, each of which affirmed the Order of the Bankruptcy Court.[12]

Petitioners now come before this Court once again, raising the same contentions that they raised in their original Petition from the judgment itself.

III.

THE DANZIG JUDGMENT IS *RES JUDICATA*: IT IS NOT SUBJECT TO COLLATERAL ATTACK BASED UPON THE PHILLIPS DECISION.

A. The Judgment Is Res Judicata.

Each of the federal courts below correctly stated that the basic issue in this proceedings is "whether res judicata applies to the *Danzig* judgment or whether debtors may collaterally attack it." (Dist.Ct.Op. p. A9.) Each court correctly held that the judgment *is res judicata* and is *not* subject to collateral attack. Despite their exhortations,

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[11] Petitioners also raised other contentions which they have now abandoned.

[12] None of these courts concluded that *Phillips* lacked "societal importance", as Petitioners claim. Each court held that the claims raised by Grynbergs did not relate to conduct involving continuing denial of fundamental constitutional rights and thus did not establish a basis for abrogating the doctrine of *res judicata*. (Bankruptcy Court Opinion, pp. A32-35; District Court Opinion, pp. A11-12.)

Petitioners fail to state any cognizable legal basis for denying *res judicata* effect to the judgment.

The *Danzig* judgment is indisputably final; it became final when this Court denied *certiorari* in the primary action:

> "In the instant case certiorari was sought and denied by the Supreme Court of the United States from the judgment of the Supreme Court of Utah. Such denial does not establish the correctness of the particular judgment but *serves only to establish the finality of the judgment as between the particular parties. The same issue cannot be renewed* by initiation of an action in the United States District Court." (Emphasis added.) (*Dairy Distributors. Inc. v. Western Conference of Teamsters* (10th Cir.1961.) 294 F.2d 348, 352.)[13]

A state judgment which is final is *res judicata* and cannot be relitigated. (*Parklane Hosiery Co. v. Shore* (1979) 439 U.S. 322, 326, n. 5; *Dairy Distributors. Inc. v. Western Conference of Teamsters, supra,* 294 F.2d 348, 352, *cert. denied* (1962) 368 U.S. 988); *Baldwin v. Iowa State Traveling Men's Association* (1931) 283 U.S. 522, 524-525. *It is irrelevant whether the claim asserted be predicated in due process or by virtue of an alleged intervening federal right. Final adjudication of the state court action bars subsequent attack upon that*

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[13] Contrary to Petitioners' repeated assertions, none of the courts below concluded that denial of *certiorari* constituted a determination on the merits by this Court and none of those courts based their respective decisions on that assumption. Each of the courts below did conclude, properly, that denial of *certiorari* constituted *this* judgment final between *these* parties, whatever the correctness of that judgment.

judgment. (Underwriters Nat. Assur. Co. v. N.C. Guaranty Assn. (1982) 455 U.S. 691, 705-707; *Kiowa Tribe of Oklahoma v. Lewis* (10th Cir. 1985) 777 F.2d 587, 589-90, *cert. den.* 107 S.Ct. 247 (1986); *Shadid v. Oklahoma City* (10th Cir. 1974) 494 F.2d 1267, 1268; *Deane Hill Country Club, Inc. v. City of Knoxville* (6th Cir. 1967) 379 F.2d 321, 325-326, *cert. denied* (1967) 398 U.S. 975; *Collins v. City of Wichita, Kansas* (10th Cir. 1958) 254 F.2d 837, 839.)

> "State courts are competent to decide questions arising under the federal constitution, and federal courts most assuredly do not provide a forum in which disgruntled parties can re-litigate federal claims which have been presented to and decided by state courts."
>
> (*Deane Hill Country Club. Inc. v. City of Knoxville, supra,* 375 F.2d at 325.)

Challenges to jurisdiction are similarly barred by res judicata if there was an *opportunity* to raise the challenge in the original action. (*Brown v. Felsen* (1979) 442 U.S. 127, 131; *Chicot County Drainage Dist. v. Baxter State Bank* (1940) 308 U.S. 371, 378.)

Thus, even if, *arguendo,* the *Danzig* case had been erroneously decided, and even if, *arguendo, Phillips* changed the law relating to the issues raised in the *Danzig* action, *Grynbergs are still bound by that judgment and cannot raise those issues again in this, or any other, proceeding. (Collins v. City of Wichita, Kansas, supra,* 254 F.2d at 839.)

> "Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside." *(Ibid)*

If the issue was litigated and decided in the state court action, as was *each* of the issues raised in Grynbergs' objections, that issue cannot be raised again. On the other hand, if Grynbergs failed to raise an issue in the state court, even though it be based on the federal constitution, they are barred from raising it in a federal action once the state court judgment has become final. (*Brown v. Felsen, supra,* 442 U.S. at 131; *Chicot County Drainage Dist. v. Baxter State Bank, supra,* 308 U.S. at 375, 378); *Tomiyasu v. Golden* (5th Cir. 1966) 358 F.2d 651, 653).

A final state court judgment is *res judicata* in bankruptcy proceedings and entitles the judgment creditor to allowance of his bankruptcy claim based upon that judgment. Once the state court judgment is final, the Bankruptcy Court is barred from relitigating the claim or the issues raised in the state court proceeding. (*Heiser v. Woodruff* (1945) 327 U.S. 726, 733-34, 736; *Teachers Ins. & Annuity Ass'n. of America v. Butler* (2nd Cir. 1986) 803 F.2d 61, 66;[14] *Beneficial Loan Co. v. Noble* (10th Cir. 1942) 129 F.2d 425, 427; *Matter of Novak* (Bkrtcy. D. Conn. 1983) 37 B.R. 31, 33.)

> "[W]e are aware of no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata,* which is founded upon the generally recognized public

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[14] "[T]he bankruptcy court should not permit the partnership to relitigate issues already decided [by the trial court], for to allow the partnership to do so, when it knew of the judgment before it filed bankruptcy, *would result in its slipping arguments through the back door that had already been turned away at the front door.*" (*Teachers Ins. & Annuity Ass'n of America v. Butler, supra,* 803 F.2d at p. 66.) (Emphasis added.)

> policy that there must be some end to litigation and that when one appears in court to present his case, is fully heard, and the contested issue is decided against him, he may not later renew the litigation in another court."
>
> (*Heiser v. Woodruff, supra,* 327 U.S. at 733.)

Petitioners fail to discuss any of these decisions. Rather, they contend that *Kremer v. Chemical Const. Corp.* (1982) 456 U.S. 461 and *Montana v. United States* (1979) 440 U.S. 147 required the 10th Circuit to "look behind" the judgment. Neither case so holds. *Kremer* did not even deal with a collateral attack on a judgment. *Kremer* dealt with an EEOC case in which the plaintiff was entitled to a trial *de novo* in the federal court. However, the federal court dismissed plaintiff's complaint after plaintiff had litigated the dismissal of his claim by the NYS Division of Human Rights through the state courts. The Supreme Court affirmed, holding that the federal courts were required to give "full faith and credit" to the state court proceedings as long as they afforded a full and fair *opportunity* to litigate the issues; *that opportunity constituted the requisite due process*. Thus, the federal courts were precluded from relitigating the issues even in a situation in which plaintiff was otherwise entitled to a trial *de novo* in federal court because he had already had an opportunity to litigate the issues. Grynbergs patently had a "full and fair opportunity" to litigate their contentions before the California courts and *did* fully litigate them.

Petitioners' repeated claims that they did not have the opportunity to raise their present contentions in the trial court are untenable and are refuted by the record. They were at all times represented by competent counsel

who, throughout the almost five years of pretrial maneuvering and discovery, and throughout the seven weeks of trial, raised every contention which they thought might be of strategic benefit to their clients. They contested jurisdiction over the *defendants* through the California appellate courts prior to trial. But they never raised *any* question concerning the court's jurisdiction over the plaintiff class, although they patently had ample opportunity to do so.

As the California courts have repeatedly held, a class action defendant may not gamble on the result of trial and, if the result is adverse, then raise objections which could and should have been raised prior to trial. (*See, e.g., Green v. Obledo* (1981) 29 Cal.3d 126, 147-48, 172 Cal.Rptr. 206, 624 P.2d 256; *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 371-74, 149 Cal.Rptr 360, 584 P.2d 497.) It is irrelevant that *Phillips* had not yet been decided; a party is not denied the opportunity to litigate an issue because the Supreme Court has not yet decided it, and is not permitted to *re*litigate it after the judgment is final. Moreover, Petitioners *did* raise the issue – for the first time – in their motions for new trial, which were argued extensively before the trial court, and before the California Court of Appeal and the California Supreme Court.

Montana is equally inapt. That case dealt solely with the application of the doctrine of collateral estoppel, not res judicata. Moreover, in *Montana*, this Court held that the United States was barred, under the doctrine of collateral estoppel, from relitigating issues in federal court which had been raised by a private party in a state court proceeding. And see *United States v. Moser* (1924) 266 U.S. 236, 242, citing *Montana*:

> "[A] fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action even though the determination was reached upon an erroneous view or by erroneous application of the law." (266 U.S. at p. 242.)

B. Phillips Does Not Constitute A Basis For Collateral Attack Upon The Judgment.

Petitioners cite no authority for the proposition that this Court's decision in *Phillips Petroleum v. Shutts* provided a basis for collateral attack upon a final state court judgment. Even assuming *arguendo*, as Petitioners contend, that *Phillips* established new due process rights for class action defendants, those rights cannot be asserted by collateral attack upon a final judgment. As the District Court stated in response to the cases cited in Grynbergs' brief before that court:

> "A change in the law regarding a constitutional right does not preclude application of *res judicata*, unless continued enforcement of the previously entered judgment would result in the continuation of unconstitutional conduct or preclusion of rights. The cases cited by debtors in which this exception has been applied are not applicable to the case at bar. In *Stanley v. Missouri State Board of Law Examiners*, 616 F.Supp. 142 (D. Mo. 1985), the issue was the continuing preclusion of plaintiff's right to practice law after similar residency requirements had been declared unconstitutional by the United States Supreme Court. The issue was the right of plaintiff to practice law in the future. *See also, e.g., Moch v. East Baton Rouge Parish School Board*, 548 F.2d 594 (5th Cir. 1977), *cert. denied*, 434 U.S. 859 (1977) and *Parnell v. Rapides Parish School Board*,

563 F.2d 180 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978). (Both cases involved the validity of school reapportionment plans still in use after changes in constitutional standards.) The continuing deprivation of constitutional rights in the above cited cases are distinguishable from the case at bar, involving a money judgment. *No continuing or future conduct is involved in this case. Further, public policies at issue in the above-cited cases, justifying an exception to the principles of res judicata are not present here.* Therefore, an exception to *res judicata* is not applicable." (Emphasis added.) (Dist. Ct. Op. p. A9.)

(*Accord, Chicot County Drainage Dist. v. Baxter State Bank, supra,* 308 U.S. 371, 376; *Douglas Guardian Warehouse Corporation v. Posey* (10th Cir. 1973) 486 F.2d 729, 742-43; *Collins v. City of Wichita, Kansas* (10th Cir. 1958) 254 F.2d 837, 839.)

IV.

PHILLIPS DOES NOT AFFECT THE DANZIG JUDGMENT.

Even if, *arguendo,* the holding of *Phillips* constituted a basis for collateral attack upon a final judgment, that decision does *not* afford any basis upon which to attack the *Danzig* judgment. As the District Court held:

"Even if an exception to the doctrine of *res judicata* were applied, the *Phillips* decision does not require a finding that the *Danzig* judgment should be overturned.

. . .

The *Phillips* decision does not entitle the Grynbergs to a reversal of the *Danzig* judgment." (Dist. Ct. Op. pp. A12-13.)

Phillips did not hold that defendants may proceed, without objection, to trial as a class action in which notice has been sent to all members of the class, and then wait to determine the nature of the judgment before objecting to the adequacy of the notice. Nothing in the *Phillips* decision suggests that it was intended to permit defendants in class actions to withhold pretrial procedural objections until after judgment has been rendered on the merits. *Phillips* requires only that there be minimal due process afforded to class members by giving them notice of the class action. Such due process was surely afforded to the *Danzig* claimants by the class notice that was sent to them as well as by the interrogatories which were sent to each of them and to which each of them responded.

Phillips did not hold that a new notice must be sent to class members each time pleadings are amended in an action that has already been certified and notice sent to the class; no authority supports that contention.

The only cases cited by Grynbergs on this issue (the same cases which they cited to each court in the appellate proceedings from the *Danzig* appeal as well as in this proceedings) are totally distinguishable. In *Zenith Laboratories, Inc. v. Carter-Wallace, Inc.* (D.N.J. 1974) 64 F.R.D. 159, *aff'd.* (3rd Cir. 1976) 530 F.2d 508, *cert. denied* (1976) 429 U.S. 828, the defendant timely requested recertification prior to trial; the amendment had alleged new facts and entirely different causes of action. In *Matarazzo v. Friendly Ice Cream Corp.* (E.D.N.Y. 1976) 70 F.R.D. 556, the objection to existing class certification was also raised prior to trial; the amendment had changed the status, and the potential burdens, of the class members. In *Danzig, no* action was taken by the defendants before the trial court

to request additional notice to the class; and two trial court judges determined prior to trial that the amendment had not introduced new legal or factual issues, but merely asserted additional theories of recovery. Moreover, *neither Zenith nor Matarazzo involved a collateral attack on the judgment*. In each case the defendant brought the issue before the trial court in which the action was pending *prior to trial*. *Phillips* did not hold either that amended pleadings must be recertified and renoticed *or* that a defendant could withhold objections to the adequacy of notice actually given to the class until after entry of judgment. *Phillips* would have required no different result in the *Danzig* action.

Furthermore, in *Danzig, each class member* filed *individual*, verified answers to interrogatories propounded by defendants, an affirmative act which constitutes a *general appearance* under California law and subjected each such party to the *general jurisdiction* of the court.[15] (*Chitwood v. County of Los Angeles* (1971) 14 Cal.App.3d 522, 526; 92 Cal.Rptr. 441.) A state may reasonably determine the nature of the acts which are sufficient to subject a party to the power of its courts. (*Chicago Life Ins. Co. v. Cherry* (1917) 244 U.S. 25, 29-30.) Submission of verified answers to interrogatories is an unequivocal affirmative act subjecting oneself to the general jurisdiction of the court. The *Danzig* claimants each *appeared* before the trial court; there is thus *no* jurisdictional issue, even if Petitioners had raised it in the trial court in the original action.

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[15] Petitioners' argument that if the judgment had been in their favor it would not have been reciprocal is thus incorrect under California law on this ground also.

In addition, each of the individual members of the class appeared generally in actions initiated by Grynbergs in the State of Colorado against all members of the class, individually, after the class action was filed in California. The *Danzig* claimants, as individuals, asserted the priority of the California action in each of those Colorado actions and requested that the actions be stayed pending judgment in the California action.[16] The *Danzig*

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[16] Grynbergs named and served all of the *Danzig* claimants in actions which were filed subsequent to the filing of the complaint in the instant action. (Third party complaint in *Viersen & Cochran Drilling Company v. Jack J. Grynberg, et al.*, U.S. District Court for the District of Colorado, Action No. 77-C-161, in which all of the class members appeared individually; and in *A.J. Carter, et al. v. Jack Grynberg, et al.*, State of Colorado, County of Rio Blanco, Action No. C-2117 which was stayed.) Grynbergs also named the representative plaintiffs in this action as defendants *individually and on behalf of all of the limited partners* in a series of actions which Grynbergs filed in Wyoming and Colorado, all of which were eventually stayed pending resolution of the instant action; Grynbergs did not suggest in any of those actions that service upon the class representatives did not join and bind all of the members of the class. (See, *e.g., Jack Grynberg and Associates, Jack Grynberg and Celeste Grynberg v. Paul Danzig, et al.*: (1) State of Wyoming, District Court of Sweetwater County, Third Judicial District, Action No. 2195; (2) State of Wyoming, District Court of Sublette County, Ninth Judicial District, Action No. 2688; (3) State of Wyoming, District Court of Lincoln County, Third Judicial District, Action No. 5402; (4) State of Wyoming, District Court of Uinta County, Third Judicial District, Action No. 69-1059; (5) State of Wyoming, District Court of Fremont County, Ninth Judicial District, Action No. 18715; (6) State of Wyoming, District Court of Carbon County, Second Judicial District, Action No. 77-C-455; and (7) State of Colorado, District Court of Moffat County, Fourteenth Judicial District, Action No. 3610.)

claimants, as individuals, thus acted continuously and consistently to assert their intent to submit themselves to the jurisdiction of the California court prior to entry of judgment in the *Danzig* action.

V.

PETITIONERS WAIVED ANY OBJECTION TO THE FORM OF NOTICE.

Petitioners contend that they could not waive the alleged inadequacy of the notice to the class; that they had no duty to object to proceeding to trial of the action as a class action if there were a deficiency in the notice to the class; and that the California courts did not adjudicate their due process claims because *Phillips* had not yet been decided. Once again, they fail to cite any applicable authority for their contentions.

It is axiomatic that a party may waive even the most basic due process rights by failing to assert them in a timely manner. (*Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée* (1981) 456 U.S. 656, 702-704; *Fleury v. Harper & Row Publishers, Inc.* (9th Cir. 1983) 698 F.2d 1022, 1029.) Lack of jurisdiction is similarly waived by failing to timely assert an objection and by proceeding before the court; the issue must be raised at the first opportunity. (*Insurance Corp. v. Compagnie des Bauxites, supra,* 698 F.2d at 1029; *cf.* F.R.C.P. 12(h)(1).) As Mr. Miller, one of Grynbergs' counsel on the original Petition for Certiorari, stated to this Court during oral argument in the *Phillips* case:

> "*We were obliged* under the normal rules of assertion of threshold defenses to *make the jurisdictional objection prior to answer and litigate* it, as we

did, in a fully adversarial context."[17] (Emphasis added.) (O.T. p. 9.)

Petitioners did *not* assert their alleged jurisdictional defense at the first opportunity, i.e., after the amendment to the complaint was allowed. They did not assert it before, or even during, trial. They did not raise the issue at all until after judgment was entered. It was then too late. No clearer waiver of the objection could exist.

Petitioners claim they had no duty to object, that under *Phillips* they could stand mute and gamble on the judgment. *Phillips* does *not* so hold. If *Phillips* conferred upon a defendant in a class action the right to have proper notice sent to all class members, then surely it conferred a commensurate duty to object to the failure to send such notice prior to trial or waive the objection, similar to any other procedural due process right. Such rights must be asserted timely or they are waived. Otherwise there would be no finality to any class action judgment. A defendant could simply withhold objections until after trial and then, if the result were adverse, raise an objection to a deficiency *which would have been cured had it been timely asserted*. No authority supports that contention. Such alleged errors cannot be asserted for the first time after entry of judgment; nor can they be raised by way of collateral attack upon the judgment.

California law expressly holds that objections to pretrial class certification procedures must be asserted *prior* to trial or are deemed waived. (*Green v. Obleda, supra*, 29

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[17] The Official Transcript of Proceedings, p. 9, *Phillips Petroleum Co. v. Shutts*, Docket No. 84-233, oral argument on February 25, 1985, is cited as "O.T.".

Cal.3d 126, 147-148, 172 Cal.Rptr. 206, 624 P.2d 256; *Civil Service Employees Ins. Co. v. Superior Court, supra.* (1978) 22 Cal.3d 362, 371-374, 149 Cal.Rptr. 360, 584 P.2d 497.) The federal courts also hold that objections to pretrial certification proceedings may not be raised for the first time after trial. (*See, e.g., Jacklitch v. Redstone Federal Credit Union* (5th Cir. 1980) 615 F.2d 679, 681; *Kelley v. Metropolitan Cty. Bd. of Ed. of Nashville and Davidson Cty., Tenn.* (6th Cir. 1972) 463 F.2d 732, 743, cert. den. (1972) 409 U.S. 1001.) *Phillips* does *not* hold to the contrary, nor is it inconsistent with this basic rule. No denial of due process results from rules which require a party to assert pretrial procedural objections prior to trial.[18]

Grynbergs' argument that the California Court of Appeal did not hold that they had waived their objections to any alleged deficiency in the class notice[19] is a patent misrepresentation. The court specifically held that Petitioners had waived *any* objection to the certification process which they had failed to assert.[20] The court also

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[18] *Young v. Katz* (5th Cir. 1971) 447 F.2d 431, cited by Petitioners, involved a direct appeal from the trial court judgment, not a collateral attack upon a final judgment. These issues *must* be raised in the original action; a party is barred by *res judicata* from raising procedural objections which should have been raised in the original action by way of collateral attack. (*Brown v. Felsen* (1979) 442 U.S. 127, 131; *Chicot County Drainage District v. Baxter State Bank* (1940) 308 U.S. 371, 378.)

[19] Such argument is impermissibly made for the first time in this Court. (*Ellis v. Dixon* (1955) 349 U.S. 458, 460.)

[20] Neither *Aetna Ins. Co. v. Kennedy* (1937) 301 U.S. 389 nor *Fuentes v. Shevin* (1972) 407 U.S. 67, cited by Petitioners,

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specifically held that the plaintiff class had received notice of the original certification of the action, which bound the class members to the judgment. As the District Court observed:

> "The California Court of Appeals specifically found that once a class action has been certified, *and notice sent to all class members* (as occurred in the *Danzig* action), *the defendant waives pretrial objections to the adequacy of that notice if he does not assert them prior to the trial.*
>
> . . .
>
> The *Danzig* judgment is not fundamentally unfair to the debtors. The debtors should have raised their objections prior to an adverse adjudication. Once a class action has been properly certified, a defendant may not sit mute, invite pretrial procedural errors, and then raise objections to pretrial procedures only after an adverse decision is reached." (Dist.Ct.Op. p. A16.)

But even if Petitioners' contention were correct, it would have no bearing on their right to *collaterally* attack the judgment.

> "Debtors were not 'precluded' from raising their contentions before the California trial court; they totally failed to raise them until after judgment was entered. Due process rights can be

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support their position. Neither involved a collateral attack, and neither involved the failure to timely assert a pretrial procedural objection. *Aetna* held that a party had not waived his right to trial by jury by moving for a directed verdict. *Fuentes* held that a debtor who signed an adhesive conditional sales contract had not waived his right to a preseizure hearing.

> waived by a party if not timely asserted. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinée*, 465 U.S. 694, 702-704 (1981). Debtors' claims were fully and fairly heard. The Grynbergs' arguments are an attempt to raise objections before the bankruptcy court and on appeal from the bankruptcy court's decision, by way of a collateral attack on the *Danzig* judgment. These are issues which they failed to assert before the California trial court. This is expressly what the doctrine of *res judicata* prohibits." (Dist. Ct. Op. p. A17.)

The *opportunity* to raise those issues was available to Petitioners and they availed themselves of that opportunity. Due process requires nothing more. (*Kremer v. Chemical Const. Corp., supra*, 456 U.S. 461, 480-481; *Brown v. Felsen, supra*, 442 U.S. 127, 131; *Chicot County Drainage Dist. v. Baxter State Bank, supra*, 308 U.S. 371, 378.)

CONCLUSION

Grynbergs set forth no cognizable ground upon which this Petition should be granted.

The *Danzig* judgment is a final judgment. Claims of deprivation of due process rights, as well as claims of infirmities in jurisdiction, are barred by the doctrine of *res judicata* as long as the petitioners had an opportunity to raise these claims in the original action. Grynbergs had that opportunity; and they did raise their claims in the original action, albeit only after judgment had been entered. The California courts determined that the judgment properly encompassed all members of the class, that all class proceedings, including notice, were adequate,

and that petitioners waived any objections which they might have had by failing to assert them prior to judgment. This Court then denied *certiorari*. Petitioners are absolutely barred from raising those claims again.

Phillips Petroleum v. Shutts provided no basis for collateral attack upon the *Danzig* judgment. Once a judgment becomes final it cannot be attacked on the ground that there has been a subsequent change in the law, or that the issues in the original action were decided incorrectly, even assuming, *arguendo*, that occurred in the instant case.

Regardless, *Phillips* was not applicable to the *Danzig* case. In *Phillips*, the issue of jurisdiction of the state court over the unnamed class members was timely asserted in the trial court; in direct contrast, the issue of alleged deficiencies in the notice which had been sent to class members was not raised until after judgment was entered. Moreover, *Phillips* did not hold that the court must provide new notice to class members if the complaint is amended or lose jurisdiction over them, particularly when the amendment is based entirely on matters already alleged and merely seeks additional remedies. In any event, each class member voluntarily made a general appearance before the California court by filing individual, verified answers to interrogatories, thereby submitting to the jurisdiction of the California trial court.

Grynbergs waived any claim that the notice sent to the members of the class was not adequate by failing to raise any objection prior to trial or entry of judgment, and by proceeding to trial on the original notice. Pretrial

procedural rights are waived unless asserted in a timely manner, or if objection is not made prior to trial.

Grynbergs' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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